



DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 405, 410, 411, 412, 413, 416, 419, 424, 485, and 489

[CMS–1772–CN; CMS–3419–CN]

RIN 0938–AU82

Medicare Program: Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment Systems and Quality Reporting Programs; Organ Acquisition; Rural Emergency Hospitals: Payment Policies, Conditions of Participation, Provider Enrollment, Physician Self-Referral; New Service Category for Hospital Outpatient Department Prior Authorization Process; Overall Hospital Quality Star Rating; COVID–19; Correction

AGENCY: Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services (HHS).

ACTION: Final rule with comment period and final rule; correction.

SUMMARY: This document corrects technical errors in the final rule with comment period and final rule that appeared in the **Federal Register** on November 23, 2023, titled “Medicare Program: Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment Systems and Quality Reporting Programs; Organ Acquisition; Rural Emergency Hospitals: Payment Policies, Conditions of Participation, Provider Enrollment, Physician Self-Referral; New Service Category for Hospital Outpatient Department Prior Authorization Process; Overall Hospital Quality Star Rating; COVID–19.”

DATES: This correction is effective January 1, 2023.

FOR FURTHER INFORMATION CONTACT:

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Nicole Hilton via email, Nicole.Hilton@cms.hhs.gov or at (410) 786-1000, for issues related to Rural Emergency Health Quality Reporting Program (REHQR).

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SUPPLEMENTARY INFORMATION:

I. Background

In the final rule with comment period and final rule that appeared in the November 23, 2022 **Federal Register** (87 FR 71748) titled “Medicare Program: Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment Systems and Quality Reporting Programs; Organ Acquisition; Rural Emergency Hospitals: Payment Policies, Conditions of Participation, Provider Enrollment, Physician Self-Referral; New Service Category for Hospital Outpatient Department Prior Authorization Process; Overall Hospital Quality Star Rating; COVID–19”, there were a number of technical and typographical errors that are identified and corrected in this correcting document. The provisions in this correction document are effective as if they had been included in the document published November 23, 2022. Accordingly, the corrections are effective January 1, 2023.

II. Summary of Errors

A. Summary of Errors in the Preamble

1. Rural Emergency Health Quality Reporting Program (REHQR)

On pages 72147 and 72148, in the discussion of “Comments on Additional Measurement Topics and for Suggested Measures for REH Quality Reporting,” we are correcting typographical and technical errors in the footnotes.

2. REH Conditions of Participation (CoP) and Critical Access Hospital (CAH) CoP Updates (CMS-3419-F)

On page 72206, in the discussion of the addition of the definition of “primary roads” to the CAH requirements at § 485.610(c), we inadvertently omitted discussion of the cross-reference making a conforming change to the requirements at § 485.610(e)(2), “*Standard: Off-campus and co-location requirements for CAHs*”; therefore, we are adding this discussion. This standard requires that if a CAH or a necessary provider CAH that operates an off-campus provider-based location, excluding an RHC as defined in § 405.2401(b) of this chapter, but including a department or remote location, as defined in § 413.65(a)(2) of this chapter, or an off-campus distinct part psychiatric or rehabilitation unit, as defined in § 485.647, that was created or acquired by the CAH on or after January 1, 2008, the CAH can continue to meet the location requirement of paragraph (c) of this section only if the off-campus provider-based location or off-campus distinct part unit is located more than a 35-mile drive (or, in the case of mountainous terrain or in areas with only secondary roads available, a 15-mile drive) from a hospital or another CAH. We are making the conforming change to note that the 35-mile drive distance from a hospital or another CAH is on primary roads.

3. Request for Information (RFI) on Use of CMS Data to Drive Competition in Healthcare Marketplaces

On page 72224, we incorrectly stated the number of timely pieces of correspondence that were submitted in response to the Competition RFI questions. We are correcting the number of timely pieces of correspondence from “21” to “22”.

B. Summary of Errors in the Regulations Text

1. On page 72306, in the REH regulations at § 485.542 (e), (e)(2), and (e)(3), we inadvertently used the term “CAH” when we intended to use the term “REH.”

2. On page 72307, we intended to amend § 485.610(e)(2) to incorporate the phrase “on primary roads” into the language and to incorporate and cross-reference the change made to “primary roads” finalized at § 485.610(c). This section requires that the off-campus provider-based location or off-campus distinct part unit of the CAH be located more than a 35-mile drive on primary roads (or, in the case of mountainous terrain or in areas with only secondary roads available, a 15-mile drive) from a hospital or another CAH. For the purpose of determining the driving distance of an off-campus provider-based location or off-campus distinct part unit of a CAH relative to other facilities, “primary roads” are defined as a numbered federal highway, including interstates, intrastates, expressways or any other numbered federal highway with 2 or more lanes each way; or a numbered State highway with 2 or more lanes each way. This technical change to § 485.610(e)(2), along with the changes made to § 485.610(c), provides clarity and consistency regarding the distance requirements. Therefore, we are correcting § 485.610(e)(2) to cross-reference the change made at § 485.610(c).

3. On page 72307, we inadvertently labeled amendatory instruction number “45” amendatory instruction “3”. Therefore, we are correcting the instruction number to read “45”. In addition, instructions “45 through 52” beginning on page 72307 and ending on page 72309 are corrected to read “46 through 53”.

III. Waiver of Proposed Rulemaking and Delay in Effective Date

Under 5 U.S.C. 553(b) of the Administrative Procedure Act (APA), the agency is required to publish a notice of proposed rulemaking in the **Federal Register** before the provisions of a rule take effect. Similarly, section 1871(b)(1) of the Social Security Act (the Act) requires the Secretary to provide notice of the proposed rulemaking in the **Federal Register** and a period of not less than 60 days for public comment. In addition, section 553(d) of the APA and section 1871(e)(1)(B)(i) of the Act mandate a 30-day delay in effective date after issuance or publication of a rule. Sections 553(b)(B) and 553(d)(3) of the APA provide for exceptions from the notice and comment and delay in effective date APA requirements; in cases in which these exceptions apply, sections 1871(b)(2)(C) and 1871(e)(1)(B)(ii) of the Act provide exceptions from the notice and 60-day comment period and delay in effective date requirements of the Act as well. Section 553(b)(B) of the APA and section 1871(b)(2)(C) of the Act authorize an agency to dispense with normal rulemaking requirements for good cause if the agency makes a finding that the notice and comment process are impracticable, unnecessary, or contrary to the public interest. In addition, both sections 553(d)(3) of the APA and section 1871(e)(1)(B)(ii) of the Act allow the agency to avoid the 30-day delay in effective date where such delay is contrary to the public interest and an agency includes a statement of support.

We believe that this correcting document does not constitute a rulemaking that would be subject to these requirements. This correcting document corrects technical and typographic errors in the preamble, addenda, payment rates, tables, and appendices included or referenced in the CY 2023 OPPS/ASC final rule but does not make substantive changes to the policies or payment methodologies that were adopted in the final rule. As a result, the corrections made through this correcting document are intended to ensure that the information in the CY 2023 OPPS/ASC final rule and the REH Conditions of Participation (CoP) and Critical Access Hospital (CAH) CoP Updates final rule accurately reflect the policies adopted in those rules.

In addition, even if this were a rulemaking to which the notice and comment procedures and delayed effective date requirements applied, we find that there is good cause to waive such requirements. Undertaking further notice and comment procedures to incorporate the corrections in this document into the final rule or delaying the effective date would be contrary to the public interest because it is in the public's interest for providers to receive appropriate payments in as timely a manner as possible, and to ensure that the CY 2023 OPPS/ASC final rule and the Critical Access Hospital (CAH) CoP Updates final rule accurately reflect our policies as of the date they take effect and are applicable.

Furthermore, such procedures would be unnecessary, as we are not altering our payment methodologies or policies, but rather, we are simply correctly implementing the policies that we previously proposed, received comment on, and subsequently finalized. This correcting document is intended solely to ensure that the CY 2023 OPPS/ASC final rule and the Critical Access Hospital (CAH) CoP Updates final rule accurately reflect these payment methodologies and policies. For these reasons, we believe we have good cause to waive the notice and comment and effective date requirements.

IV. Correction of Errors

In FR Doc. 2022–23918 of November 23, 2022 (87 FR 71748), make the following corrections:

A. Correction of Errors in the Preamble

1. On page 72147, third column, footnote 274 is corrected to read: “In Brief, Rural Behavioral Health, Telehealth Challenges and Opportunities, SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, (Nov 2016).

<https://store.samhsa.gov/product/In-Brief-Rural-Behavioral-Health-Telehealth-Challenges-and-Opportunities/SMA16-4989>.”.

2. On page 72148, first column, footnote 277 is corrected to read: “Centers for Medicare and Medicaid Services Measures Inventory Tool: Emergency Department Utilization (EDU). <https://cmit.cms.gov/cmit/#/MeasureView?variantId=4866§ionNumber=1>.”.

3. On page 72148, first column, footnote 279 is corrected to read: “All-Cause Emergency Department (ED) Utilization for Medicaid Beneficiaries Public Comment Framing Document. <https://www.cms.gov/files/document/all-cause-ed-utilization-medicaid-beneficiaries-measure-framing-document.pdf>.”.

4. On page 72148, third column, footnote 283 is corrected to read: “Gabayan, G, et al. (January 17, 2013) Factors Associated With Short-Term Bounce-Back Admissions After Emergency Department Discharge. *Annals of Emergency Medicine*, 62(2): 136–144. <https://doi.org/10.1016/j.annemergmed.2013.01.017>.”.

5. On page 72206, under the section titled “b. Changes for Critical Access Hospital Conditions of Participation (Part 485, Subpart F)”--

a. First column, the title “(1) Conditions of Participation: Status and Location (§ 485.610(c))” is corrected to read: “(1) Condition of Participation: Status and Location (§ 485.610(c) and 485.610(e)(2))”.

b. Second column, first partial paragraph, lines 7 through 13, the sentence “The current regulatory requirement at § 485.610(c) sets forth the distance requirements for CAHs relative to other CAHs and hospitals, and specific definitions as related to the distance requirements are found in the SOM, Chapter 2, Section 2256A,” is corrected to read, “The current regulatory requirement at § 485.610(c) sets forth the distance requirements for CAHs relative to other CAHs and hospitals. Additionally, the regulatory requirement at § 485.610(e)(2) sets forth the distance requirements for off-campus provider-based locations of the CAH. Specific definitions as related to the distance requirements are found in the SOM, Chapter 2, Section 2256A.”

6. On page 72224, third column, in the section titled “Request for Information on Use of CMS Data to Drive Competition in Healthcare Marketplaces”, line 6, correct the number “21” to

read “22”.

B. Correction of Errors in the Regulations Text

§ 485.542 [Corrected]

7. On page 72306, first column—

a. Fourth paragraph, “(e) Emergency standby and power systems,” line 2, “CAH” is corrected to read “REH”.

b. Sixth paragraph, “(2) Emergency generator inspection and testing”, line 2, “CAH” is corrected to read “REH”.

c. Seventh paragraph, “(3) Emergency generator fuel”, line 1, “CAHs” is corrected to read “REHs”.

§ 485.610 [Corrected]

8. On page 72307,

a. Second column, bottom half of the page, the amendatory instruction “3. Section 485.610 is amended by revising paragraph (c) to read as follows:” is corrected to read:

“45. Section 485.610 is amended by:

a. Revising paragraph (c); and

b. Amending paragraph (e)(2) by adding the phrase “on primary roads, as defined in paragraph (c)(2) of this section” after the phrase “a 35-mile drive”.

The revision reads as follows:”

9. On pages 72307 through 72309, Amendatory instructions “45” through “52”, appearing in numerical order, are corrected to read “46” through “53” respectively.

Elizabeth J. Gramling,

Executive Secretary to the Department,

Department of Health and Human Services.

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